IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13581 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M/S B & BROTHERS ENGINEEING WORKS CHHAKODIA MAHADEV
Versus
UNION OF INDIA, THROUGH SECRETARY

Appearance:
1. Special Civil Application No. 13581 of 2000
MR BT RAO for MR SN THAKKAR for Petitioner No. 1-2
MR JM MALKAN for Respondent No. 1-3
RULE SERVED BY DS for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 06/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. The petitioner No.1 - M/s. B & Brothers Engineering works and its Partner Shri Ashvin Bhailalbhai Patel, petitioner No.2, have filed this petition before this Court under Article 226 of the Constitution and made the following prayer in Para : 8(A) & (B) :

(A) Your Lordships may be pleased to hold and declare that the petitioner No.1 is entitled to the benefit of the Karvivad Samadhan Scheme 1998 as brought into force by the Finance Act No.II of 1998 and that therefore the payment made by the petitioner No.1 on 30.3.999 be accepted by the respondents and the necessary certificate be issued to the petitioner No.1 under Section 90(2) of the Kar Vivad Samadhan Scheme, 1998.

(B) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction quashing and setting aside the impugned order at Annexure : D.

2. Show cause notice dated 5.4.1995 was issued to the petitioner No.1 - Company, calling upon to show cause as to why Central Excise duty amounting to Rs.5,06,914/- should not be recovered from it. The said demand was confirmed by the learned Addl. Commissioner of Central Excise in order in original dated 25.5.1998. Against which the petitioner No.1 company had filed appeal before the Commissioner (Appeals) on 3.9.1990. Mean while, Kar Vivad Samadhan Scheme, 1998, came into force with effect from 1.9.1998 providing one time offer by the Government for quick and easy settlement of tax dues, outstanding in various categories of pending cases disputes, by offering substantial benefit to the assessees. The petitioner No.1 company had also tried to take advantage of the scheme and filed Declaration Form No.1-B on 29.1.1999 as provided u/s.90(1) of the Finance Act (No.21 of 1998) (Annexure : A). The Commissioner, Central Excise, Ahmedabad - 1, by his order dated 19.2.1999 (Annexure : B), passed in exercise of his powers u/s.90(1) of the Finance Act of 1998, determined the amount payable by the declarant towards full and final settlement of their tax arrears covered by the declaration under the scheme. The amount of tax arrears declared in form towards the duty was Rs.10,13,828/- and the penalty amount of Rs.25 lacs, in all Rs.35,13,828/-. However, learned Commissioner determined the amount as payable u/s.88(1) of the Finance

Act, 1998 for only Rs.5,06,940/- and ordered the declarant - petitioner No.1 company to make the payment of the said amount within 30 days from the date of the certificate/order (Annexure:B).

U/s.90(2) of the Finance Act of 1998 the declarant - assessee was bound to pay the amount of Rs.5,06,940/- determined by the designated Authority i.e. Commissioner, Central Excise, Ahmedabad, within 30 days of the passing of the impugned order (Annexure : B) by the Designated Authority and intimated the fact of such payment to the Designated Authority along with the proof thereof. Thereupon the Designated Authority was required to issue Certificate of declaration.

3. At this stage, we think it proper to reproduce both, Section 90(1) and 90(2) of the Finance Act of 1998, which are as under :

90. Time and manner of payment of tax arrear -

(1) within sixty days from the date of receipt of the declaration under section 88, the designated authority shall, by order, determine the amount payable by the declarant in accordance with the provisions of this Scheme and grant a certificate in such form as may be prescribed to the declarant setting forth therein the particulars of the tax arrear and the sum payable after such determination towards full and final settlement of tax arrears :

Provided that where any material particular furnished in the declaration is found to be false, by the designated authority at any stage, it shall be presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax enactment under which the proceedings against the declarant are or were pending shall be deemed to have been revived:

Provided further that the designated authority may amend the certificate for reasons to be recorded in writing.

(2) The declarant shall pay, the sum determined by the designated authority within thirty days of the passing of an order by the designated authority and intimate the fact of such payment to the designated authority along with proof thereof and the designated authority shall

thereupon issue the certificate to the declarant.

4. In the instant case, as stated earlier, the designated Authroity - Commissioner, Central Excise, Ahmedabad, had passed an order dated 19.2.1999 and determined the amount and the petitioner No.1 - declarant was supposed to make payment within 30 days of the passing of the order. The order was passed on 19.2.1999, therefore, 30 days period would be over on 21.3.1999, which was Sunday, therefore, the petitioner No.1 was supposed to pay on 22.3.1998, as per the bare reading of the provision of Section 90(2) of the Act. However, learned Counsel Shri Rao for the petitioners submitted that the petitioner No.1 Company had received the roder dated 19.2.1999 (Annexure : B) only on 24.2.1999, as stated in Reply Affidavit by the respondents. Therefore, the petitioner No.1 Company was required to pay the said amount as determined by the designated Authority on or before 26.3.1999. Instead, the petitioner No.1 Company paid it on 30.3.1999 as, on 27.3.1999 (i.e. Saturday) it was a Strike in the petitioner's Bank i.e. Bank of Baroda, and 28.3.1999 was the holiday on account of Sunday and 29.3.1999 was the public holiday on account of "Bakri Eid". Thus, there was a delay of only one day in paying the amount of Rs.5,06,940/- as determined by the Designated Authority.

5. Shri Rao submitted that having accepted the said amount of Rs.5,06,940/- as determined by the Designated Authority under Order (Annexure : B), the designated Authority was required to issue the Certificate in favour of the declarant. But, the said Certificate was not issued in favour of the declarant - petitioner No.1 Company. Instead the Joint Commissioner of Central Excise, HQ, Ahmedabad, by his letter dated __/6/1999 (Annexure ; D) informed the petitioner No.1 company that it has not paid the sum payable as per form 2B Certificate under Kar Vivad Samadhan Scheme, 1998, therefore, they are not eligible for full and final settlement of Tax arrears Certificate in From - 3 under Kar Vivad Samadhan Scheme, 1998. He submitted that having received that communication dated ___/6/1999 (Annexure:D) the petitioner No.1 Company made representation to the Commissioner, Central Excise & Customs, Ahmedabad-1, on 27.7.1999 (Annexure : E), but the same remained unreplied, therefore, after waiting for a period of more than six months, another representation dated 22.2.2000 was made by the petitioner No.1 Company (Annexure : F) to the Commissioner, Central Excise and Customs, Ahmedabad. The same also remained unreplied, therefore, the petitioner, at last, was obliged to

approach this Court by way of this petition in the month of April, 2000.

6. Shri Rao for the petitioners submitted that as per the provisions of General Clauses Act, the petitioner could have made the payment of the amount determined by the designated Authority as per order (Annexure : B) on 27.3.1999, but on 27.3.1999 (Saturday) the Bank remained closed due to strike, 28th March, 1999 was the Sunday and 29th March, 1999 was public holiday i.e. "Bakri Eid". Thus, on these two public holidays it could not deposit the amount, therefore, immediately on 30th March, 1999, it had paid the amount. He submitted that having accepted the amount the respondent - Authority could not have denied the issuance of form No.3 under Kar Vivad Samadhan Scheme, 1998, in favour of the petitioner No.1 company. He, therefore, submitted that the Joint Commissioner of Central Excise committed an error in passing the impugned order at Annexure : D dated ___/6/1999 and, therefore, the same be quashed and set aside and the respondents be directed to issue necessary Certificate in favour of the petitioners.

7. Bare reading of Section 90(2) of the Finance Act of 1998 shows that within a period of 30 days from the date of Certificate/Order issued by the designated Authority, the declarant was required to make the payment as determined by the Designated Authority. The Certificate/order was issued by the designated Authority in this case on 19.2.1999 and the declarant was required to pay within 30 days from the date of Certificate i.e. by 21.3.1999 i.e. Sunday. Therefore, it could have paid the amount on 22.3.1999. The respondent - Authority has also stated in their Reply Affidavit that period of 30 days would start from the date of receipt of the order, which was received by the petitioner on 24th March, and not 25th March, as stated in the petition on oath by the petitioner. Therefore, we would not like to go into that question whether the petitioner No.1 was required to pay the amount determined by the designated Authority on 22.3.1999 or not. Even assuming for the sake of argument that 30 days period was to start from the date of receipt of said order and the said impugned order dated 19.2.1999 (Annexure : B) was received by the petitioner NO.1 Company on 24.2.1999 then the last day would be 26th March, 1999. If the declarant had not availed that benefit and paid the amount determined by the designated Authority on or before 26.3.1999 then, in absence of any provision of condoning delay in making payment late, no fault can be found with the impugned order passed by the Joint Commissioner. If there is specific period of

limitation provided for filing the Suit and if the Suit is not filed within a period of limitation and if it is filed even on the next date, no Courts have any jurisdiction. Similarly the respondent Authority, in absence of any provision for condoning the delay provided under the Finance Act, has no jurisdiction to issue the Certificate in absence of any provision on the belated payment.

8. It is no doubt true that this is a very harsh case, but in absence of any specific provision for condonation of delay this Court is totally helpless in exercising its discretionary writ jurisdiction in favour of the petitioners.

9. At this stage, we must state that learned Counsel Shri Rao for the petitioners tried to submit that there is a Judgment of Orissa High Court in his favour by which delay was condoned, but he was not in a position to produce the same, therefore, we can not take note of such arguments advance by Shri Rao for the petitioner.

10. Lastly, Shri Rao submitted that on one hand the respondents are not issuing necessary certificate in favour of the petitioner No.1 Company on the ground of delayed payment after expiry of period of limitation provided under Section 90(2) of the Act of 1998 and on the other hand they are not refunding the amount of Rs.5,06,914/-, which was deposited by the petitioner No.1 Company, on 30.3.1999. Therefore, the respondents be directed to refund that amount with interest to the petitioner. Neither there is any grievance made in this petition about this, nor any prayer made in this petition. Therefore, there is no question of considering this oral prayer of Shri Rao for the petitioner. That apart, there is provision u/s.93 of the Finance Act, 1993, under which any amount paid pursuant to the declaration made u/s.88 by the declarant is not refundable under any circumstances. Therefore, there is no question of granting this oral prayer for refund of the said amount which was deposited by the petitioner No.1 Company in pursuance of declaration made by it u/s.88(1) of the Finance Act, 1998.

11. In view of the above discussion, this petition fails and is hereby dismissed. Rule discharged. However, there shall be no order as to costs.

sd/-
(B.J.Shethna, J.)
Date : September 06, 2004 sd/-

(Sharad D.Dave, J.)

sas